

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of)

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)

WT Docket No. 08-165

COMMENTS FROM MAYOR ROGER LANGE, CITY OF LONGMONT, COLORADO

These Comments are filed by Mayor Lange, City of Longmont, Colorado, to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. Mayor Lange also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or

effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in Longmont, Colorado.

1. LEGAL REQUIREMENTS FOR FACILITY SITING

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings, others are required by state and local law to follow certain processes and procedures.

Longmont, Colorado, has a specific ordinance that addresses wireless telecommunication facility siting. The ordinance was enacted in 1996, after the appropriate public hearing and vote of City Council. The ordinance has been amended several times since it was enacted in 1996.

Residents of Longmont have expressed concerns regarding wireless facilities, and in particular freestanding wireless facilities, since they typically have adverse visual impacts on the community. A current provision of the wireless telecommunication section of the municipal code (Section 15.05.170.A.3) indicates that "Building/structure mounted wireless telecommunication facilities meeting the standards of this section are preferred over new freestanding facilities. The applicant shall explore all potential options for locating a facility on an existing building or structure prior to submitting an application for a freestanding facility."

2. NUMBER OF APPLICATIONS AND OUTCOMES

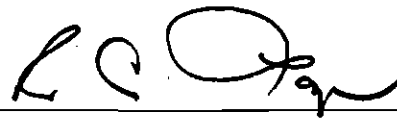
Since the City implemented the wireless telecommunications ordinance in 1996, the City has approved 35 applications for wireless telecommunication facilities. Consistent with the ordinance provisions to encourage co-location of wireless telecommunication facilities and minimize visual impacts associated with wireless facilities, most of the approvals have been for facilities located on existing structures or buildings and a majority of the applications have been approved administratively rather than requiring a public hearing process. Public hearings are generally required for freestanding facilities or facilities that require variances or are proposed in residential areas. The time required to process wireless telecommunication facility applications has typically been equal to or less than the time required to process other similar types of applications.

Other issues associated with wireless telecommunication facilities, such as interference with reception of television or radio broadcasts or health related issues from radio frequency power densities and electromagnetic fields are regulated by the Federal Communications Commission and the City of Longmont is already preempted in those areas.

3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Lange', is positioned above a horizontal line.

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